Supreme Court, U.S.
FILED

991561 FEB 8 - 2000

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

RUBY OLIVER AND FELIX OLIVER.

PETITIONERS,

vs.

SIBU P. SAHA M.D. - RESPONDENT(S)

On Petition For Writ of Certiorari

To Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

John Famularo
Attorney for the Respondent(s)
250 W. Main St. Suite 2300
Lexington, KY 40507

Ruby Oliver Pro Se
Felix L. Oliver
543 Laketower Dr. #119
Lexington, KY 40502

March 20th, 2000

72 pp

QUESTIONS PRESENTED

We respectfully request to the most powerful Court of this land to **reverse the erroneous verdict of the Jury and the acceptance of the Fayette Circuit Court, Third Division, Docket No. 94-CI-2797.**

We proved to the Jury and the Court that the defendants were negligence.

The defendants jointly and severally through their own admission recognized their negligence, their erroneous diagnosis as lack of full disclosure of probable damages and permanent disability inflicted on my person.

Furthermore, **Dr. Sibu Saha committed perjury under oath** denying ever having malpractice suits brought against him (Tape A #3 March 4, 1998 14:44:36).

The records in the Fayette Circuit Court reveal three lawsuits at the present there are nine. (Kindly see page V).

We believe that we are going to find justice with the Supreme Court not only for me, but for other people who like me, find themselves in the hands of Doctors, Sibu P. Saha and Anthony Rogers.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioners are Ruby Oliver and Felix Oliver.

Defendant, Sibu Saha, M.D. is and at all times herein mentioned was, a physician duly licensed to practice medicine in the Commonwealth of Kentucky.

Defendant Cardiovascular & Thoracic Associates, P.S.C. is a corporation organized and existing under the laws of the Commonwealth of Kentucky.

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Patricia Monie and Jaime E. Monie vs Sibu P. Saha et al
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Jack Arnett AL vs Baptist Health Care System et al
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Ramey, Joe vs Baptist Health Care System Inc. Sibu P.
Saha MD and Anthony Rogers MD
No. 1997-CA-001291
Court of Appeals reversed Fayette Circuit Court.

Erma Holt of the State of Glozone Holt (deceased) and Erma Holt individually
97-CI-3818 vs Sibu P. Saha MD et al
Circuit Court First Division

Adkins Billy et al, vs Sibu Saha MD et al
99-CI 02886

Bowling Laurence E. vs Central Baptist Hospital, Sibu Saha, MD et al
98-CI-03556

Everage Margie et al vs Sibu Saha MD, et al
98-CI-0277502

Ann Rentas vs Sibu P. Saha et al
99-CI-04115

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Supreme court to review the merits appears at Appendix 6 to the petition and is reported at November 10, 1999.

The opinion of the denied court appears at Appendix 6 to the petition.

JURISDICTION

The date on which the Supreme court decided my case was November 10, 1999. A copy of that decision appears at Appendix 6. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

STATEMENT OF THE CASE

On Monday, September 25, 1993 we visited Dr. Sibu Saha complaining of tickle on my throat which was making me hacking cough and a sense of fulness on the right side of my chest. We showed him the chest X-rays and Cat Scan done at Pattie Clay Hospital by Dr. Jerome Krumpelman on

September 21, 1993.(Appx. #18) Dr. Krumpelman suggested we see Dr. Saha since the studies showed a lesion on upper part of my right lung.(Appx. 11) After a very cursory examination consisting of blood pressure reading, weigh in and temperature. Dr. Saha requested we see him in his office to review the X-Rays and Ct scans. Upon reviewing the X-Ray examinations Dr. Saha diagnosed a Tumor either a neurogenic tumor or an intrathoracic goiter (see enclosure) or other malignancy.(Appx. #10) We suggested doing a byopsy since I have a propensity of developing cysts. He absolutely refused stating he had extensive experience and further testing

was not indicated. He also state that he could palpate the "tumor" underneath the right clavicle. We asked if the operation was going to be done in the area where he said he could palpate the tumor he said that it would be done on my back through a small incision and at the most I could end with a broken rib. Since the ribs had to be separated. After the operation he stated that I would have to rest for six weeks and after that lead a normal life. He did not offer other therapeutic alternatives such as needle aspiration or VATS (video assisted thoracic surgery). He then returned all the X-ray films to us and the front desk gave me an appointment for

surgery on September 31, at 9:00 am.

On September 26, 1993 my husband spoke to Dr. Saha about doing further testing but he absolutely refused telling him that if he (Dr. Saha) thought it was an intrathoracic goiter why not do a nuclear scan. He refused, stating he was a 100% certain of his diagnosis an no further testing was indicated. We did not asked for a second opinion because he could guarantee us that the lesion was not malignant and the operation carried no further risks except for a few broken ribs. On September 31, 1993, I was hospitalized and scheduled for surgery the following morning. I was administered intravenous fluids

containing potasium, antibiotics and pherengan at 9:00 a.m. Around 10:00 a.m. I saw Dr. Saha and his assistant. At approximately 4:00 p.m. that same day a nurse asked me to sign a paper that I refused to sign at first because some other doctors were mentioned which I did not recognize, but she (the nurse) said it was a hospital form. We signed the document but not Dr. Saha. (Appx.- #15)

The next day at 8:00 a.m. I underwent surgery (bronchoscopy and right thoracotomy) by Dr. Saha and his assistant, Dr. Anthony Rogers in a record time of twenty four (24) minutes.(Appx. #16) Dr. Rogers then said the "tumor" was benign and that I suffered several

broken ribs and that they had performed the most painful surgery of all.

After recovering from the anesthesia I was experiencing the most agonizing pain in my life, hundred time over child birth. Four days later I was sent home still suffering with the pain. The following day I called his office for pain medication and I was told that Dr. Saha had left on a trip to **India and will not return in a month**.

REASONS FOR GRANTING THE WRIT

The petitioners were told that **the verdict was based on the evidence that the operation was properly performed and that we did not request a second opinion**. The person was a member of the jury who spoke to one of our counsels, Mr. Bing Bush.

The Supreme Court of Kentucky (entered November 10, 1999) and the Court of Appeals of Kentucky rendered July 16, 1999. The Honorable Judges Buckingham, Combs and Mcnulty ruled the trial court committed any errors therefore, they would not disturb jury's verdict and did not accepted the proves from the Fayette Circuit Court (Case #94-CI-02797) Tape #2

9 96:55 photos.

In Tape #2, March 3, 1998, at 9:35:12 to 9:39:37, I explained to the jury the conversation that occurred on October 25, 1993 in the office of Sibu Saha, M.D. where he explained that I needed an operation because what I had was a tumor; after different questions posed to Dr. Saha; he explained that the type of operation he was planning **to perform was a small incision in my back** and perhaps the biggest risk of the operation was some broken ribs.(Appx. #8) TESTIMONY OF SIBU SAHA, M.D. - On direct by Hon. John Famularo, March 4, 1998 (Fayette Circuit Court, Video tape #4, 13:41:95) Denied having facilities to

perform thoracoscopy. The evidence reveals that from 1991-1994, 38 thoracoscopies were performed by Dr. Saha and associates.

On direct by the Hon. Charlie Taylor, counsel for petitioners, Dr. Saha (Tape #3 14:46:07) admitted his diagnosis was incorrect. (Appx. #10) (Tape #3 15:04:04) admits he failed to mention the risks of the operation. (Tape #3 - 15:10:41), not offering us alternatives treatments available in this State. (Tape #3 15:10:46) admits he performed surgery without the X-rays, CT Scans films to consult during the surgery. (Tape #3 14:44:36). The evidence presented by defendants

consisting of a video tape and a wall chart shown to the jury showed the lesion in the wrong location. Attorney Charlie Taylor requested the evidence to be discharged by the court. Dr. Anthony Rodgers on his admission (Tape #4 19:09:21) said that he did not inform of the risk, probable deformity, life-long, painful and risky treatments and the use of potent pain killers. He admits his group do not tell the risks and complication to the patients so that they would not refuse the surgery. Dr. Dieter, the expert witness for the defendants declared that it was an act of negligence not to have the X-rays in operating room for consultation and that

the operation should have been done by the (VATS) PROCEDURE (Tape #3 18:27:50).

On revision of the court records from 1998-1999 show that nine (9) malpractice suits have been filed against Dr. Sibu P. Saha.

I was discharged November 5, around 11:00 a.m. in very poor conditions with no medications. We had stop at his office to obtain a prescription of twenty (20) percocet to take when I realized I did not have sufficient medication, I called his office and discovered he was in India.

The Fayette Co. Circuit court, 3rd Division did not allow photographs, nurses notes showing I was vomiting, and

the report that I had an infiltrate in my right lung as shown in the X-rays. The films also showed multiple broken ribs. (Appx. #12 & 12A)

CONCLUSION

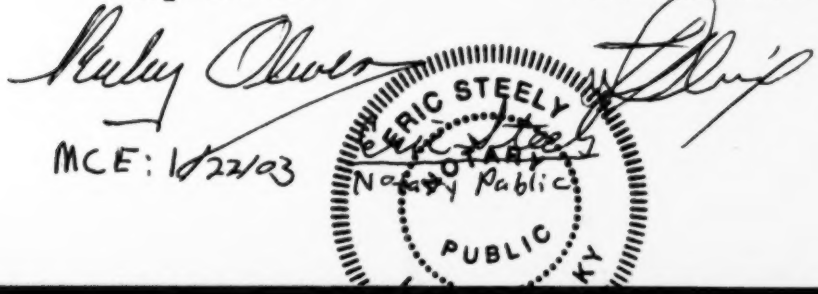
The defendants jointly and severally through their onw admission recognized their negligence their erroneous diagnosis as lack of full disclosure of probable damages and permanent disability inflicted on my person.

Furthermore, Dr. Sibu Saha committed perjury under oath denying ever having malpractice suits brought against him (Tape A #3 March 4, 1998 14:44:36)

The records in the Fayette Circuit Court reveal three lawsuits at the present there are nine. (Kindly see page III)

Respectfully submitted by,

Ruby Oliver Felix Oliver



MCE: 1/22/03

Appendix 1

COMMONWEALTH OF KENTUCKY

FAYETTE CIRCUIT COURT

DIVISION

FAYETTE COUNTY, KENTUCKY

CIVIL ACTION NO.:_____

RUBY OLIVER and

FELIX L. OLIVER,

Plaintiffs,

V. **COMPLAINT WITH JURY DEMAND**

MICHAEL G. ESTRIDGE, M.D.,
1221 South Broadway
Lexington, Kentucky 40504 and

LEXINGTON CLINIC, P.S.C.,
1221 South Broadway
Lexington, Kentucky 40504 and

SIBU P. SARA, M.D.,
168 Burt Road
Lexington, Kentucky 40503 and

CARDIOVASCULAR AND THORACIC ASSOCIATES,
P.S.C.,
168 Burt Road
Lexington, Kentucky 40503,
Defendants.

COMPLAINT

Come now the Plaintiffs, Ruby Oliver and Felix L. Oliver, and for their cause of action state as follows:

1. Plaintiffs, Ruby Oliver and Felix L. Oliver, are citizens and residents of Lexington, Fayette County, Commonwealth of Kentucky.

2. Defendant, Michael G. Estridge, M.D., was at all times hereinafter mentioned a physician licensed to practice medicine in the Commonwealth of Kentucky, and was engaged in the practice of medicine in and about Fayette County, Kentucky.

3. Upon information and belief, Lexington Clinic, P.S.C., was a professional service corporation incorporated under the laws of the Commonwealth of Kentucky.

4. Defendant, Sibu P. Saha, M.D., was at all times hereinafter mentioned a physician licensed to practice medicine in the Commonwealth of Kentucky, and was engaged in the practice of medicine in and about Fayette County, Kentucky.

5. Upon information and belief, Cardiovascular and Thoracic Associated, P.S.C., was a professional service corporation incorporated under the laws of the Commonwealth of Kentucky.

6. At all times hereinafter mentioned, the Plaintiff, Ruby Oliver, was a paying patient of each of the Defendants, and was married to the Plaintiff Felix Oliver.

Count I

Plaintiffs incorporate by reference Paragraphs 1 through 6 as if fully set forth herein.

7. The Defendant, Michael G. Estridge, M.D., negligently, carelessly, wrecklessly, incompetently, and in a -marked deviation from the normal standard of care, failed to properly examine, treat and evaluate the Plaintiff, Ruby Oliver, and was otherwise negligent.

8. The aforesaid negligence, carelessness, wrecklessness, incompetence and marked deviation from the normal standard of care include, but are not limited to, the following:

a) Failure to properly evaluate and diagnose the condition from which the

Plaintiff, Ruby Oliver, was suffering; and,

b) Failure to properly treat the condition from which the Plaintiff, Ruby Oliver, was suffering.

9. As a direct and proximate result of the negligence, carelessness, recklessness and marked deviation from the normal standard of care, the Plaintiff, Ruby Oliver, now has a huge disfiguring scar extending from her back into her right breast area, has suffered medical deformities of part of her back, has developed post-thoracotomy pain syndrome, neuromas, partial disability of her right arm, post-operative depression, and has suffered a loss of her ability to enjoy life. All of the above injuries and damages are permanent and lasting in nature.

10. As a further direct and proximate result of the negligence, carelessness, wrecklessness and marked deviation from the standard of care, the Plaintiff, Ruby Oliver, will be obligated in the future to incur expenses f or medicine, hospitalizations, doctors' bills, and other medical care and attention in an amount, which at this time, cannot be ascertained.

11. As a direct and proximate result of the negligence, carelessness, wrecklessness and marked deviation from the normal standard of care, the Plaintiff, Ruby Oliver, has suffered pain and mental anguish, and will continue to suffer pain and mental anguish in the future.

COUNT II

12. Plaintiffs incorporate by reference Paragraphs 1 through 11 as if fully set forth herein.

13. Upon information and belief Defendant, Michael G. Estridge, M.D., was an employee of, and acting within the course and scope of his employment with, Defendant Lexington Clinic, P.S.C., which is therefore liable under the Doctorine of Respondeat Superior or the conduct of Dr. Estridge, as already described.

COUNT III

14. Plaintiffs incorporate by reference Paragraphs 1 through 13 as if fully set forth herein. The Defendant, Sibu P. Saha, M.D., negligently, carelessly, wrecklessly, incompetently, and in a marked deviation from the normal standard of care, failed to properly

examine, treat and evaluate the Plaintiff, Ruby Oliver, and was otherwise negligent.

15. The aforesaid negligence, carelessness, wrecklessness, incompetence and marked deviation from the normal standard of care include, but are not limited to, the following:

a) Failure to disclose less evasive procedures which could have been employed to achieve the same result;

b) Failure to properly treat the condition from which the Plaintiff, Ruby Oliver, was suffering;

c) Failure to mention possible complications such as post-thoracotomy pain syndrome and post-operative deformity; and,

d) Failure to obtain the proper informed consent from the Plaintiff, Ruby Oliver.

16. As a direct and proximate result of the negligence, carelessness, recklessness and marked deviation f rom the normal standard of care, the Plaintiff, Ruby Oliver, has a huge disfiguring scar extending from her back into her right breast area, has suffered medical deformities of part of her back, has developed post- thoracotomy pain syndrome, neuromas, partial disability of her right arm, post-operative depression, and has suffered a loss of her ability to enjoy life. All of the above injuries and damages are permanent and lasting in nature.

17. As a further direct and proximate result of the negligence, carelessness, wrecklessness and marked deviation from the standard of care, the Plaintiff, Ruby Oliver, will be obligated in the future to incur expenses for

medicine, hospitalizations, doctors, bills, and other medical care and attention in an amount, which at this time, cannot be ascertained.

18. As a further direct and proximate result of the negligence, carelessness, wrecklessness and marked deviation from the normal standard of care, the Plaintiff, Ruby Oliver, has suffered pain and mental anguish, and will continue to suffer pain and mental anguish in the future.

COUNT IV

19. Plaintiffs incorporate by reference Paragraphs I through 18 as if fully set forth herein.

20. Upon information and belief Defendant, Sibu P. Saha, M.D., was an employee of, and acting within the course

and scope of his employment with, Cardiovascular and Thoracic Associates, P.S.C., which is therefore liable under the Doctorine of Respondeat Superior for the conduct of Dr. Saha as already described.

COUNT V

Comes now the Plaintiff, Felix L. Oliver, by counsel, and for his cause of action, states as follows:

21. The Plaintiff, Felix L. Oliver, incorporates, by reference, Paragraphs 1 through 20, as if fully set forth herein.

22. As a direct and proximate result of the negligence of the Defendants stated in Counts I, II, III, and IV, Plaintiff, Felix L. Oliver, has suffered the loss of society and services of consortium of his wife, Ruby Oliver.

WHEREFORE, the Plaintiffs demand a trial by jury, and a judgment against all Defendants herein jointly and severally for I the damages set forth above in an amount which shall be fair and reasonable, as well as all other relief to which they may be entitled by reason of the pleadings and proofs offered herein.

RUBY OLIVER and
FELIX L. OLIVER,
By Counsel

Respectfully submitted,

_____UNCLEAR_____

Stanley E. Preiser

Monty L. Preiser

Glenn M. Nichols

Preiser Law Firm

P.O. Box 1306

Charleston, WV 25325

(304) 346-6080

(304) 342-7113 (fax)

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
THIRD DIVISION
NO. 94-CI-2797

RUBY OLIVER, ET AL. — PLAINTIFFS,

vs. **TRIAL VERDICT AND JUDGEMENT**

SIBU SAHA, M.D., ET AL. DEFENDANTS

* * * * * * *

The parties represented by counsel appeared this 2nd through 5th of March, 1998 and thereupon came the following jury, towit:

Jeff Nicholson	Henry Eminger
Robert Maxwell	Karen Acar
Terry Peniston	Dan Young
Ray Ingold	Betty Gillispie
Michael Clemmons	Joseph Lyons
Grac'ie Wiley	David Napier
Sherman Fields II	Celia L. Thornsburg

who were duly sworn to try the issues herein.

The trial progressed and plaintiffs having announced closed, the defendants moved for a directed verdict. The motion of the defendants was overruled.

The trial continued and being concluded, defendants renewed their motion for a directed verdict which was overruled. The plaintiffs also made a motion for a directed verdict which was overruled. At the conclusion of all testimony, Joseph Lyons and David Napier were dismissed-from further consideration in this action as the alternate jurors.

184450:1ex

The jury retired and returned into Court returning the following verdict, to-wit.

INTERROGATORY NO. I

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as forth Instruction No. 2 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver ?

YES _____

NO ____X_____

Sherman Fields

FOREPERSON (if unanimous)

INTERROGATORY NO. 2

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as forth Instruction No. 3 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver ?

YES _____

NO ____X_____

Sherman Fields

FOREPERSON (if unanimous)

Said verdict was accepted by the Court and the jury was excused from further service in this case.

Based upon said verdict, it is hereby ***ORDERED AND ADJUDGED*** that the above styled matter is dismissed with prejudice as to the defendants, SIBU SAHA, M.D. and CARDIOVASCULAR AND THORACIC

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION

RUBY OLIVER and,
FELIX OLIVER PLAINTIFF

V. 94 CI-02797

JURY INSTRUCTIONS

SIBU SAHA, M.D., et al. DEFENDANTS

****

INSTRUCTION NO. 1

(A) Immediately upon retiring to the jury room, you should elect one of your number as Foreperson.

(B) Nine or more of you must agree in order to answer any of the questions or make any of the determinations required by these instructions. The nine or more of you who agree on one, however, need not be the same jurors who agree upon another.

(C) Each Interrogatory on which the verdict is not unanimous must be signed by the nine or more of you who agree.

INSTRUCTION NO. 2

In disclosing to the Plaintiff, Ruby Oliver, the risks of the surgical operation he proposed to perform upon her, it was the duty of the Defendant, Sibu Saha, M.D., to exercise the degree of care and skill expected of a reasonably competent physician specializing in thoracic surgery and acting under similar circumstances, which duty included a duty to inform the Plaintiff, Ruby Oliver, of any alternative procedures which were medically reasonable.

Please proceed to Interrogatory No. 1.

INSTRUCTION NO. 3

It was the duty of the Defendant, Sibu Saha, M.D., in treating the Plaintiff, Ruby Oliver, to exercise the degree of care and skill of a reasonably competent physician specializing in thoracic surgery and acting under similar circumstances.

Please proceed to Interrogatory No. 2.

INSTRUCTION NO. 4

If your answer to Interrogatory No. 1 and/or No. 2 is "YES", you will award the Plaintiff, Ruby Oliver, such sum of money as you believe from the evidence will fairly and reasonably compensate her for such of the following damages which you believe to be related to the thoracotomy performed on her on November 1, 1993, including any damages caused by the activation or aggravation of any preexisting condition.

(A) Past medical expenses, not to exceed $57,963.34: $_____

(B) Future medical expenses, not to exceed $250,000.00 $_____

(C) Pain and suffering, including loss of enjoyment of life, both past, present and future: $_____

TOTAL $_____

Foreperson or juror signatures on next page.

INSTRUCTION NO. 5

If your answer to Interrogatory No. 1 and/or No. 2 is "YES", you will award the Plaintiff, Felix Oliver, such sum of money as you believe from the evidence will fairly and reasonably compensate him for such of the following damages which you believe to be related to his wife's post thoracotomy pain syndrome:

(A) Loss of consortium, which includes the loss of services, assistance, aid, society, companionship and conjugal relationship,

(C) not to exceed $100,000.00:

$_____

_____

FOREPERSON

(if unanimous)

_____

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MEMBERS OF THE JURY

(if not unanimous)

INTERROGATORY NO. I

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as set forth in Instruction No. 2 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver?

YES _____ NO _____

___UNCLEAR_____

FOREPERSON

(if unanimous)

_____

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_____

MEMBERS OF THE JURY

(if not unanimous)

Please proceed to Instruction No. 3.

INTERROGATORY NO. 2

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as set forth in Instruction No. 3 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver?

YES _____ NO _____

___UNCLEAR_____

FOREPERSON

(if unanimous)

_____

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_____

MEMBERS OF THE JURY

(if not unanimous)

If you have answered "YES" to terrogatory No. 1 or

Interrogatory No. 2, or "YES" to both Interrogatory No. I and Interrogatory No. 2, please proceed to Instruction No.4.

If you have answered "NO" to both Interrogatory No. 1 and Interrogatory No. 2, please return to the courtroom.

___UNCLEAR_____

FOREPERSON

(if unanimous)

_____

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_____

_____

_____

MEMBERS OF THE JURY

(if not unanimous)

Please proceed to Instruction No. 5

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CASE NO. 94-CI-2797

RUBY OLIVER, ET AL PLAINTIFFS

V.S.

PLAINTIFFS' MOTION TO SET ASIDE VERDICT

AND MOTION FOR A NEW TRIAL

SIBU SAHA, M.D., ET AL DEFENDANTS

*** *** ***

Come the Plaintiffs, Ruby Oliver and Felix Oliver, M.D., and move the Court to set aside the verdict herein and grant them a new trial for the following reasons:

(1.) After the Defendants' expert witness, Dr. Dieter, testified on direct, the Court took a brief recess or break, during which time Dr. Dieter approached the Jury and conversed with members of

the Jury, and specifically with the person who subsequently was elected Jury Foreperson. Thereafter, Dr. Dieter re-took the stand and testified under cross examination by Mr. Taylor.

(2.) Errors in the Instructions given to the jury in which the issue of causation was presented.

(3.) Other errors occurring at the trial.

NOTICE

The foregoing Motions will come on for hearing before the Hon. Rebecca Overstreet, Judge, Fayette Circuit Court, Third Division, Fayette County Courthouse, 215 West Main Street, Lexington, Kentucky, on April 3, 1998 at the hour of 9:30 a.m., or as soon thereafter as same may be heard.

_____UNCLEAR_____
Bing I. Bush, Sr.
Charles A. Taylor
213 East Main Street, P.O. Box 881
Georgetown, Kentucky 40324
Phone: 502-863-5066
Fax: (502) 863-3019
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon Defendants by Fascimile, 606-253-0144, to the Hon. John M. Famularo, STITES & HARBISON, 250 West Main Street, 2300 Lexington Financial Center, Lexington KY 40507, followed by mail, on this the 30th day of March, 1998.

_____

Bing I. Bush, Sr.

Oliver-D-19-96

Appendix 4

FAYETTE CIRCUIT COURT
THIRD DIVISION

RUBY OLIVER, et al. PLAINTIFFS

V.S.

ORDER NO. 94CI-2797

SIBU SAHA, M.D., et al.

* * * * *

This matter having come before the Court upon the motion of plaintiffs, Ruby and Felix Oliver, to set aside verdict and for a new trial, and the Court now having considered said motion and being otherwise sufficiently advised, it is hereby ***ORDERED AND ADJUDGED*** that the said motion is ***OVERRULED.***

Dated this6th day of April, 1998.

_____

JUDGE
FAYETTE CIRCUIT COURT, THIRD DIVISION

Served by hand delivering a true copy to:

John M. Famularo
250 W. Main Street
Lexington, KY 40507

Charles Taylor, Esq.
177 North Limestone
Lexington, KY 40507

this 7th day of April, 1998.

RENDERED: July 16, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001036-MR

RUBY OLIVER AND FELIX L. OLIVER
APPELLANTS

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 94-CI-002797

SIBU P. SAHA, M.D., AND
CARDIOVASCULAR AND THORACIC
ASSOCIATES, PSC APPELLEES

OPINION
AFFIRMING

* * * * * *

BEFORE: BUCKINGHAM, COMBS, and McANULTY, Judges.

McANULTY, JUDGE: Ruby (Ruby) and Felix (Felix) Oliver, - both proceeding pro se, appeal from the March 30, 1998, trial judgment and verdict dismissing their medical malpractice suit with prejudice

and from the April 7, 1998, order overruling their motion to set aside verdict and for a new trial. A unanimous jury found that the defendant, Sibu Saha, M.D., did not fail to perform his duty to inform Ruby of the risks of the surgical operation and of any alternative procedures which were medically available or his duty to exercise the appropriate degree of skill in his treatment of Ruby. Having reviewed the trial court record, and the parties, respective briefs, we find no error. Therefore, we affirm.

At the outset of this opinion, the Court notes that Ruby attached several exhibits to her brief which were not presented to the jury at trial. Because those "exhibits" are not a part of the record on appeal, they have been disregarded in our consideration of the

merits of the appeal. Croley v. Alsip, Ky., 602 S.W.2d 418 (1980).

This lawsuit arose as a result of a November 1, 1993, surgery to remove what was later identified as a mediastinal cyst from below Ruby's clavicle. Prior to the surgery, Ruby and her husband, a licensed and practicing radiologist, met with Dr. Saha to discuss Ruby's condition and future treatment. Ruby neither sought a second opinion, nor did she ask or seek to ask any questions of Dr. Saha regarding the proposed surgery. On October 31, 1993, prior to surgery, Ruby signed an operative permit form in the presence of a witness which stated in part that:

> 5. I have talked to the above named doctor and he has explained to my satisfaction the nature and purpose of the operation, with possible

alternative methods of treatment as well as complications. No guarantee or assurance has been given to me by anyone as to the results that may be obtained by surgery or anesthesia.

Drs. Saha, Rogers, Earle, and Wilcox were the named physicians on the operative permit form. The following day, Dr. Saha performed a thorocotomy, which is an invasive procedure, to remove the mass. She sustained one (1) broken rib in the course of the operation. Following this procedure, Ruby developed a condition known as postthorocotomy pain syndrome and has continued to experience pain.

Ruby and Felix filed a complaint on September 16, 1994, against Michael G. Estridge, M.D., Lexington Clinic, P.S.C., Sibu P. Saha, M.D., and Cardiovascular and Thoracic Associates, P.S.C. for the failure to properly evaluate, diagnose,

and treat the condition from which Ruby was suffering and that this failure caused-Ruby to incur permanent injuries and damages. As to Dr. Saha inparticular, the complaint alleged that he failed to disclose less invasive procedures, to properly treat the condition,to mention possiblecomplications, or to obtain the proper informed consent. Felix's claim was for the loss of society and services of consortium of Ruby, his wife. The claims against Dr. Estridge and Lexington Clinic were later settled and dismissed. The claims against Dr. Saha and Cardiovascular and Thoracic Associates were not settled, and proceeded to a trial by jury from March 2 through March 5, 1998. Ruby and Felix were represented by counsel at trial.

At trial, both sides presented expert testimony regarding the

appropriate procedure to follow in Ruby's situation and whether Dr. Saha obtained informed consent from Ruby for the operation. Ruby and Felix presented testimony that Dr. Saha should and could have performed a less invasive surgery (either a video-assisted thoroscopic surgery or a needle aspiration) , and that Dr. Saha should have told Ruby of these other less invasive procedures available to her. Ruby argued that due to Dr. Sahals failure to tell her of the other options available and the possible side effects of the procedure performed, she did not give an informed consent for the thorocotomy. On the other hand, Dr. Saha presented testimony that a thorocotomy was the only viable option under the circumstances and that he did receive informed consent from Ruby for the proposed operation.

At the close of the evidence, the judge read the instructions and interrogatories to the jury. After reviewing the conflicting evidence presented at trial, the jury returned a unanimous verdict for the defense on both instructions. The lawsuit was dismissed with prejudice on March 20, 1998.

On March 30, 1998, Ruby and Felix moved to set aside the verdict and for a new trial. The grounds cited in the motion were a defense witness's contact with the jury during a break in the course of the trial, errors in the instructions relating to causation, and other errors at trial. Following an oral argument on the motion, at which time only the first two grounds were argued, Judge Overstreet orally overruled the motion from the bench and then issued and had entered a written order overruling

the motion on April 7, 1998. This appeal followed.

Ruby's brief filed in support of her appeal to this Court appears to be a recitation of the contested matters presented to the jury, along with some statements which are admittedly not a part of the record on appeal. The appellees have argued that this Court should not disturb the jury verdict and that Ruby and Felix have failed to present any error committed by the trial court in their brief. we agree with the appellees.

It is well settled in Kentucky that a reviewing court may not usurp the province of the jury and disturb its findings on conflicting evidence. In Stewart v. Sizemore, Ky., 306 S.W.2d 821, 823 (1957), the Court stated that:

> it is not within the province of the Court to usurp the prerogative of a jury and decide as a matter of law which set of witnesses is worthy of belief. A definite issue was developed on the point in question, which was supported by substantial competent evidence on behalf of each of the parties, and neither the trial court nor this one may exercise independentjudgment in evaluating this particular testimony.

Id. at 823. Citing the Stewart case, the Court in Fields v. Baker, Ky., 329 S.W.2d 376 (1959), held that when there was evidence on each side that was substantial enough to go to a jury, a reviewing court could not usurp the prerogative of the jury and disturb its

findings. In Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382, 385 (1985), the Supreme Court stated that "an appellate court must not substitute its findings of fact for those of the jury if there is evidence to support them." In our review of the trial, we found substantial evidence presented at trial to support the jury's unanimous verdict. Therefore, we will not disturb the jury's findings.

Ruby also failed to present any errors of the trial court in her brief. "It is incumbent upon the litigant who seeks reversal of a trial court's judgement to demonstrate to an appellant court that the trial court has committed error which is prejudicial to the substantial rights of the litigant." Bincrham v. Davis, Ky., 444 S.W.2d 123, 123 (1969). Citing Ballard v. King, Ky.,

373 S.W.2d 591 (1963), this Court later ruled that "a reversing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." Milby v. Mears, Ky.App., 580 S.W.2d 724, 727 (1979). Because Ruby failed to I demonstrate that the trial court committed any error, her appeal must fail.

Based upon the foregoing, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:
Ruby Oliver, Pro se
Felix L. Oliver, Pro se
Lexington, KY

BRIEF FOR APPELLEE:
John M. Famularo
Darren J. Duzyk
Lexington, KY

Served by hand delivering a true copy to:

John M. Famularo
250 W. Main Street
Lexington, KY 40507

Charles Taylor, Esq.
177 North Limestone
Lexington, KY 40507

this 7th day of April, 1998.

Supreme Court of Kentucky

99-SC-751-D
(98-CA-1036-MR)

RUBY OLIVER AND FELIX L. OLIVER MOVANTS

V. FAYETTE CIRCUIT COURT
94-CI-2797

S I B U P. SAHA, M.D., ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

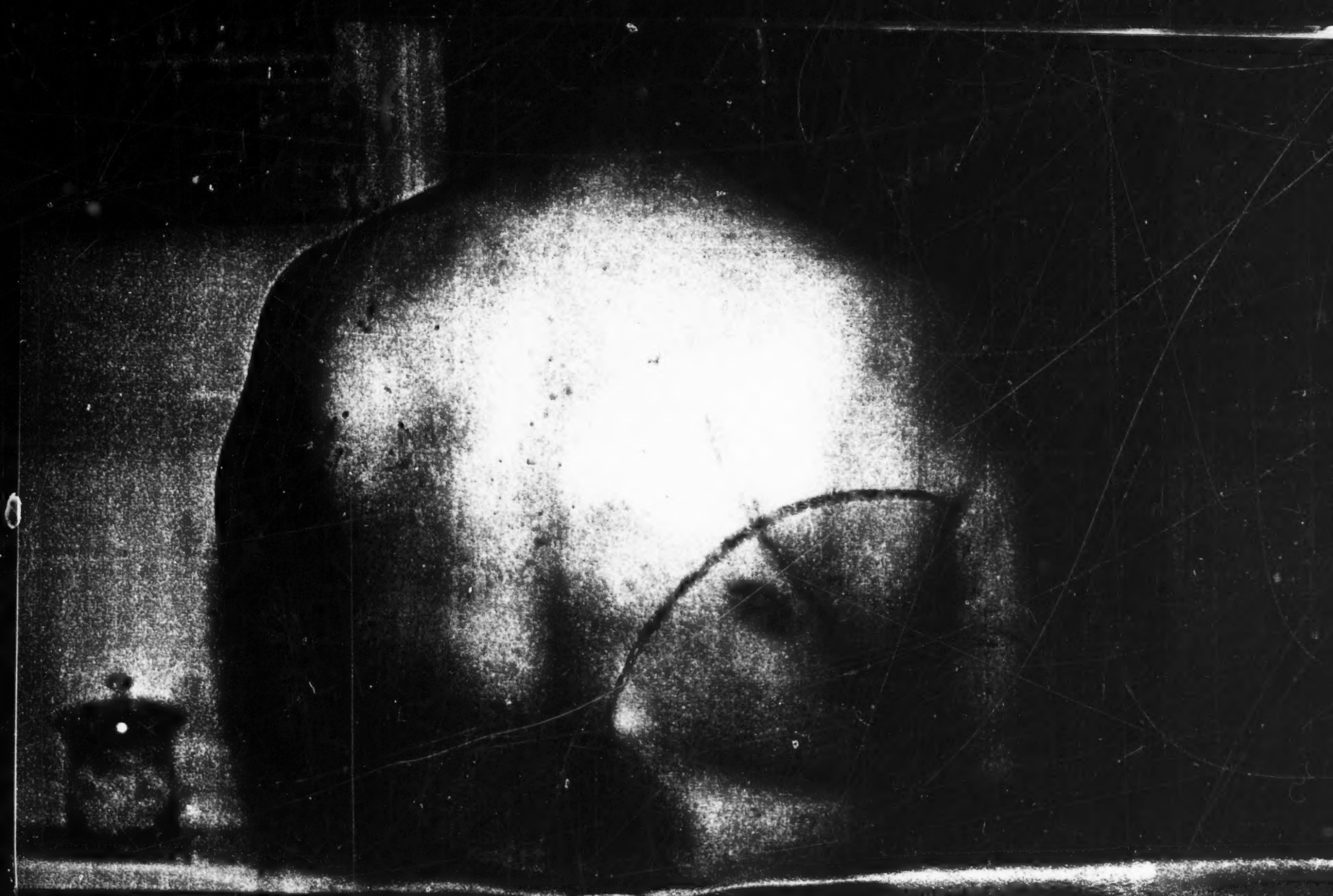
The motion for discretionary review of the decision of the Court of

Appeals is denied.

ENTERED November 10, 1999.

_____
Chief Justice

Appendix 7



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No. 99-1561

In The

Supreme Court of the United States

RUBY and FELIX OLIVER,

Petitioners,

vs.

SIBU P. SAHA, M.D. and
CARDIOVASCULAR AND
THORACIC ASSOCIATES, P.S.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Kentucky Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The Petition for Writ of Certiorari presents no questions for review. Petitioners seek review of a denial of a motion for discretionary review by the Kentucky Supreme Court, but identify no questions of federal law implicated in that denial.

PARTIES

The Petitioners are Ruby and Felix Oliver.

The Respondents are Sibu P. Saha, M.D. and Cardiovascular and Thoracic Associates, P.S.C.

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CITATIONS

Petitioners seek review of an unpublished Order Denying Discretionary Review of the Kentucky Supreme Court. Attached as Appendix "A." That Motion for Discretionary Review sought the reversal of an unpublished Opinion Affirming of the Kentucky Court of Appeals. Attached as Appendix "B." In the Kentucky Court of Appeals, Petitioners sought to overturn a jury verdict entered against them in Fayette Circuit Court. Attached as Appendix "C."

STATEMENT OF JURISDICTION

Petitioners seek to invoke jurisdiction under 28 U.S.C. § 1257(a); however, as their Petition for Writ identifies no issues of federal law, jurisdiction is inappropriate. Furthermore, in the state court proceedings below, Petitioners failed to file a timely motion for discretionary review in the Kentucky Supreme Court and are thus barred from pursuing an appeal.

CONSTITUTIONAL PROVISIONS/ STATUTES/REGULATIONS

28 U.S.C. § 1257(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

Kentucky Rule of Civil Procedure 76.20(2)(b)

> A motion for discretionary review by the Supreme Court of a Court of Appeals decision shall be filed within 30 days after the date of the order or opinion sought to be reviewed unless (i) a timely petition under Rule 76.32 or (ii) a timely motion for reconsideration under Rule 76.38(2) has been filed or an extension of time has been granted for that purpose, in which event a motion for discretionary review shall be filed within 30 days after the date of the order denying the petition or motion for consideration or, if it was granted, within 30 days after the date of the opinion or order finally disposing of the case in the court of Appeals.

Kentucky Rule of Civil Procedure 76.20(2)(d)

> The failure of a party to file a Motion for Discretionary Review within the time specified in this Rule, or as extended by a previous order, shall result in a dismissal of the Motion for Discretionary Review.

COUNTERSTATEMENT OF THE CASE

I. Course of Proceedings and Disposition of the Case Below.

This medical malpractice suit arose as a result of a November 1, 1993, surgery to remove a mediastinal cyst from below the clavicle of Ruby Oliver. On October 31, 1993, Ruby and Felix Oliver met with Dr. Saha and discussed her condition and future treatment. On that day, Mrs. Oliver signed an operative permit form acknowledging that her proposed treatment had been explained to her satisfaction. The next day Dr. Saha performed the surgery, a thorocotomy. In the course of the procedure, Mrs. Oliver sustained a broken rib. Following this surgery, she developed a condition known as post-thorocotomy pain syndrome and has continued to experience pain.

On September 16, 1994, the Olivers filed suit in Fayette Circuit Court. The complaint alleged that Dr. Saha failed to disclose less invasive procedures, to treat properly the condition, to mention possible complications, or to obtain the proper informed consent. A claim for loss of consortium was asserted by Mr. Oliver.

The case went to trial March 2 through March 5, 1998. The Olivers were represented by counsel at trial.

At trial, both sides presented expert testimony. The Olivers presented testimony that Dr. Saha should have performed a less invasive procedure and that he should have informed her of other less invasive alternatives. The Olivers argued that as these alternatives were not explained, she did not give informed consent. Dr. Saha

presented testimony that a thorocotomy was the only viable option under the circumstances and that he did receive informed consent. At the close of all the evidence, the judge read the instructions to the jury. A unanimous jury found that Sibu P. Saha, M.D. did not fail to perform his duty to inform Mrs. Oliver of the risks of the surgical procedure and of alternative procedures that were medically available and that he exercised the appropriate degree of skill in his treatment of Mrs. Oliver. On March 30, 1998, the Olivers moved to set aside the verdict and for a new trial. The circuit court judge overruled the motion from the bench and then issued and had entered a written order overruling the motion on April 7, 1998. The Olivers appealed from the trial judgment and verdict dismissing their suit and from the order overruling their motion to set aside and for a new trial.

On July 16, 1998, the Kentucky Court of Appeals affirmed on the grounds that the Olivers failed to present any error committed by the trial court and that the Olivers instead simply presented a recitation of contested matters presented to the jury.

On August 10, 1999, the Olivers served their Motion for Discretionary Review. On August 12, 1999, the Respondents filed a Motion to Dismiss the Untimely Motion for Discretionary Review. By Order dated August 31, 1999, the Kentucky Supreme Court denied Respondents' motion without comment.

Respondents filed a Response to Motion for Discretionary Review on September 14, 1999. On November 10, 1999, the Kentucky Supreme Court entered an Order Denying Discretionary Review without comment.

II. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15.2, the Respondents bring to the Court's attention the following misstatements of fact contained in the Petition.

Respondents have not made an admission of negligence, erroneous diagnosis, failure to fully disclose or permanent disability.

Respondent Sibu P. Saha, M.D., has not committed perjury regarding lawsuits alleging medical malpractice.

Respondent Sibu P. Saha, M.D., did not guarantee that the lesion was benign.

Neither the Supreme Court of Kentucky nor the Court of Appeals of Kentucky ruled that the trial court committed any error.

Dr. Dieter did not testify that it was an act of negligence not to have the x-rays in the operating room nor did he testify that the operation should have been done by the VATS procedure.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Respondents respectfully oppose the Petition for Writ of Certiorari. The Petition for Writ raises no issues of federal law; rather, the Petition seeks to have the Court overturn the verdict of a state court based upon a review of disputed evidence that a jury has considered. Finally, Petitioners failed to comply with state court appellate

procedure and are thus barred from pursuing this Petition for a Writ of Certiorari.

I. THE PETITION FOR A WRIT OF CERTIORARI MUST BE DENIED AS NO ISSUES OF FEDERAL LAW ARE RAISED

Section 1257 of title 28 of the United States Code defines the Supreme Court's appellate jurisdiction over state court rulings. It provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

In sum, only those state court decisions bearing upon questions of federal law are within the Court's jurisdiction. Unless a federal question has been raised and decided in the state court below, the appellate jurisdiction of the Supreme Court fails. *Illinois v. Gates*, 462 U.S. 213, 222, 103 S.Ct. 2317, 76 L. Ed. 2d 527 (1983). The Petition for Writ identifies no federal law issues and, in fact, none are implicated by either the denial of the motion for discretionary review by the Kentucky Supreme Court or by the Opinion Affirming of the Kentucky Court of

Appeals. The Petition for Writ presented to this Court merely recites a litany of disputed facts which, in Petitioners' opinion, would have supported a jury verdict in their favor. Petitioners identify no issues of federal law. In fact, Petitioners have never identified issues of law or error on the part of the trial court at all. (Opinion Affirming, p. 6.) In affirming the jury verdict, the Kentucky Court of Appeals relied exclusively upon state law stating: "It is well settled in Kentucky that a reviewing court may not usurp the province of the jury and disturb its findings on conflicting evidence." (Opinion Affirming p. 5) (citing *Stewart v. Sizemore*, 306 S.W. 2d 821, 823 (Ky. 1957); *Fields v. Baker*, 329 S.W. 2d 376 (Ky. 1959); *Horton v. Union Light, Heat & Power*, 690 S.W. 2d 382, 385 (Ky.1985)). The court continued: "In our review of the trial [record], we found substantial evidence presented at trial to support the jury's unanimous verdict. Therefore, we will not disturb the jury's findings." (Opinion Affirming p. 6.) As is made clear in the Opinion Affirming, under Kentucky law, the state appellate courts will not search the record for errors, but, rather, confine their consideration to errors identified by the briefs. *Bingham v. King*, 444 S.W. 2d 123, 123 (Ky. 1969), *Milby v. Mears*, 580 S.W. 2d 724, 727 (Ky. App., 1979) (citing *Ballard v. King*, 373 S.W. 2d 591 (Ky. 1979)).

Clearly, the issues presented in the courts below were issues of fact and state law. Petitioners raise no questions of federal law and none have been passed upon by the state courts. Therefore the U.S. Supreme Court does not have jurisdiction over this matter and the Petition must be denied.

II. THE PETITION FOR WRIT MUST BE DENIED AS PETITIONERS FAILED TO FOLLOW PROPER STATE APPELLATE PROCEDURE.

Petitioners failed to follow the state court procedure for filing of a motion for discretionary review. Failure to follow the proper state procedure alone provides grounds for denial of the Petition. *Hammerstein v. Superior Court*, 341 U.S. 491, 492, 71 S.Ct. 820, 95 L.Ed. 1135 (1951).

The Kentucky Rules of Civil Procedure provide that a motion for discretionary review by the Supreme Court of a Court of Appeals decision must be filed within twenty days of the date of the opinion to be reviewed. Ky. R.C.P. 76.20(2)(b). The rules further provide that failure to comply with the filing deadlines "shall result in a dismissal of the Motion for Discretionary Review." Ky. R.C.P. 76.20(2)(d).

The Kentucky Court of Appeals rendered its decision on July 16, 1999. Petitioners' time to file a motion for discretionary review lapsed on August 5, 1999. Petitioners did not serve their Motion for Discretionary Review until August 10, 1999. Petitioners filed no petition for rehearing or reconsideration by the Court of Appeals. As Petitioners failed to comply with the proper state court procedure in the prosecution of their appeal, the Petition for Writ of Certiorari must be denied.

CONCLUSION

For the foregoing reasons, this Court should deny review of the Kentucky Supreme Court's decision.

Respectfully submitted,

JOHN M. FAMULARO
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Attorneys for Respondents
250 West Main Street, Suite 2300
Lexington, Kentucky 40507
(606) 226-2300

APPENDIX

Supreme Court of Kentucky

99-SC-751-D
(98-CA-1036-MR)

RUBY OLIVER AND FELIX L. OLIVER MOVANTS

FAYETTE CIRCUIT COURT
V. 94-CI-2797

SIBU P. SAHA, M.D., ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied.

ENTERED November 10, 1999.

/s/ Joseph E. Lambert
Chief Justice

RENDERED: July 16, 1999; 10:00 a.m
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001036-MR

RUBY OLIVER AND FELIX L. OLIVER APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 94-CI-002797

SIBU P. SAHA, M.D., AND
CARDIOVASCULAR AND THORACIC
ASSOCIATES, PSC APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, COMBS, and McANULTY, Judges.

McANULTY, JUDGE: Ruby (Ruby) and Felix (Felix) Oliver, both proceeding pro se, appeal from the March 30, 1998, trial judgment and verdict dismissing their medical malpractice suit with prejudice and from the April 7, 1998, order overruling their motion to set aside verdict and for a new trial. A unanimous jury found that the defendant. Sibu Saha, M.D., did not fail to perform his duty to inform Ruby of the risks of the surgical operation and of any alternative procedures which were medically available or his duty to exercise the appropriate degree of skill in his treatment of Ruby. Having reviewed the trial

court record, and the parties' respective briefs, we find no error. Therefore, we affirm.

At the outset of this opinion, the Court notes that Ruby attached several exhibits to her brief which were not presented to the jury at trial. Because those "exhibits" are not a part of the record on appeal, they have been disregarded in our consideration of the merits of the appeal. *Croley v. Alsip*, Ky., 602 S.W.2d 418 (1980).

This lawsuit arose as a result of a November 1, 1993, surgery to remove what was later identified as a mediastinal cyst from below Ruby's clavicle. Prior to the surgery, Ruby and her husband, a licensed and practicing radiologist, met with Dr. Saha to discuss Ruby's condition and future treatment. Ruby neither sought a second opinion, nor did she ask or seek to ask any questions of Dr. Saha regarding the proposed surgery. On October 31, 1993, prior to surgery, Ruby signed an operative permit form in the presence of a witness which stated in part that:

> 5. I have talked to the above named doctor and he has explained to my satisfaction the nature and purpose of the operation, with possible alternative methods of treatment as well as complications. No guarantee or assurance has been given to me by anyone as to the results that may be obtained by surgery or anesthesia.

Drs. Saha, Rogers, Earle, and Wilcox were the named physicians on the operative permit form. The following day, Dr. Saha performed a thorocotomy, which is an invasive procedure, to remove the mass. She sustained one (1) broken rib in the course of the operation. Following this procedure, Ruby developed a condition known as post-

thorocotomy pain syndrome and has continued to experience pain.

Ruby and Felix filed a complaint on September 16, 1994, against Michael G. Estridge, M.D., Lexington Clinic, P.S.C., Sibu P. Saha, M.D., and Cardiovascular and Thoracic Associates, P.S.C. for the failure to properly evaluate, diagnose, and treat the condition from which Ruby was suffering and that this failure caused Ruby to incur permanent injuries and damages. As to Dr. Saha in particular, the complaint alleged that he failed to disclose less invasive procedures, to properly treat the condition, to mention possible complications, or to obtain the proper informed consent. Felix's claim was for the loss of society and services of consortium of Ruby, his wife. The claims against Dr. Estridge and Lexington Clinic were later settled and dismissed. The claims against Dr. Saha and Cardiovascular and Thoracic Associates were not settled, and proceeded to a trial by jury from March 2 through March 5, 1998. Ruby and Felix were represented by counsel at trial.

At trial, both sides presented expert testimony regarding the appropriate procedure to follow in Ruby's situation and whether Dr. Saha obtained informed consent from Ruby for the operation. Ruby and Felix presented testimony that Dr. Saha should and could have performed a less invasive surgery (either a video-assisted thoroscopic surgery or a needle aspiration), and that Dr. Saha should have told Ruby of these other less invasive procedures available to her. Ruby argued that due to Dr. Saha's failure to tell her of the other options available and the possible side effects of the procedure performed, she did not give an informed consent for the thorocotomy. On

the other hand, Dr. Saha presented testimony that a thorocotomy was the only viable option under the circumstances and that he did receive informed consent from Ruby for the proposed operation.

At the close of the evidence, the judge read the instructions and interrogatories to the jury. After reviewing the conflicting evidence presented at trial, the jury returned a unanimous verdict for the defense on both instructions. The lawsuit was dismissed with prejudice on March 20, 1998.

On March 30, 1998, Ruby and Felix moved to set aside the verdict and for a new trial. The grounds cited in the motion were a defense witness's contact with the jury during a break in the course of the trial, errors in the instructions relating to causation, and other errors at trial. Following an oral argument on the motion, at which time only the first two grounds were argued, Judge Overstreet orally overruled the motion from the bench and then issued and had entered a written order overruling the motion on April 7, 1998. This appeal followed.

Ruby's brief filed in support of her appeal to this Court appears to be a recitation of the contested matters presented to the jury, along with some statements which are admittedly not a part of the record on appeal. The appellees have argued that this Court should not disturb the jury verdict and that Ruby and Felix have failed to present any error committed by the trial court in their brief. We agree with the appellees.

It is well settled in Kentucky that a reviewing court may not usurp the province of the jury and disturb its

findings on conflicting evidence. In *Stewart v. Sizemore*, Ky., 306 S.W.2d 821, 823 (1957), the Court stated that:

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Id. at 823. Citing the *Stewart* case, the Court in *Fields v. Baker*, Ky., 329 S.W.2d 376 (1959), held that when there was evidence on each side that was substantial enough to go to a jury, a reviewing court could not usurp the prerogative of the jury and disturb its findings. In *Horton v. Union Light, Heat & Power Co.*, Ky., 690 S.W.2d 382, 385 (1985), the Supreme Court stated that "an appellate court must not substitute its findings of fact for those of the jury if there is evidence to support them." In our review of the trial, we found substantial evidence presented at trial to support the jury's unanimous verdict. Therefore, we will not disturb the jury's findings.

Ruby also failed to present any errors of the trial court in her brief. "It is incumbent upon the litigant who seeks reversal of a trial court's judgement to demonstrate to an appellant court that the trial court has committed error which is prejudicial to the substantial rights of the litigant." *Bingham v. Davis*, Ky., 444 S.W.2d 123, 123 (1969). Citing *Ballard v. King*, Ky., 373 S.W.2d 591 (1963), this Court later ruled that "a reversing court will generally confine itself to errors pointed out in the briefs and

will not search the record for errors." *Milby v. Mears*, Ky.App., 580 S.W.2d 724, 727 (1979). Because Ruby failed to demonstrate that the trial court committed any error, her appeal must fail.

Based upon the foregoing, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ruby Oliver, Pro se
Felix L. Oliver, Pro se
Lexington, KY

BRIEF FOR APPELLEE:

John M. Famularo
Darren J. Duzyk
Lexington, KY

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
THIRD DIVISION
NO. 94-CI-2797

RUBY OLIVER, ET AL. PLAINTIFFS,

VS. **TRIAL VERDICT AND JUDGMENT**

(Filed Mar. 20, 1998)

SIBU SAHA, M.D., ET AL. DEFENDANTS

* * *

The parties represented by counsel appeared this 2nd through 5th of March, 1998 and thereupon came the following jury, to-wit:

Jeff Nicholson	Henry Eminger
Robert Maxwell	Karen Acar
Terry Peniston	Dan Young
Ray Ingold	Betty Gillispie
Michael Clemmons	Joseph Lyons
Gracie Wiley	David Napier
Sherman Fields II	Celia L. Thornsburg

who were duly sworn to try the issues herein.

The trial progressed and plaintiffs having announced closed, the defendants moved for a directed verdict. The motion of the defendants was overruled.

The trial continued and being concluded, defendants renewed their motion for a directed verdict which was overruled. The plaintiffs also made a motion for a directed verdict which was overruled. At the conclusion of all testimony, Joseph Lyons and David Napier were

dismissed from further consideration in this action as the alternate jurors.

The jury retired and returned into Court returning the following verdict, to-wit.

INTERROGATORY NO. 1

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as forth Instruction No. 2 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver?

YES ____
NO X

Sherman Fields
FOREPERSON (if unanimous)

INTERROGATORY NO. 2

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as forth Instruction No. 3 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver?

YES ____
NO X

Sherman Fields
FOREPERSON (if unanimous)

Said verdict was accepted by the Court and the jury was excused from further service in this case.

Based upon said verdict, it is hereby ***ORDERED AND ADJUDGED*** that the above styled matter is dismissed

with prejudice as to the defendants, SIBU SAHA, M.D. and CARDIOVASCULAR AND THORACIC ASSOCIATES, P.S.C. and plaintiffs are not to recover any damages herein.

It is further ***ORDERED AND ADJUDGED*** that said defendants shall recover from the plaintiffs their costs incurred in this action.

Dated this 19th day of March, 1998.

/s/ Rebecca Overstreet
JUDGE

ENTRY OF ORDER PURSUANT TO RFCC 16 B.2.
IN AS MUCH AS COUNSEL FOR PLAINTIFF HAS FAILED TO RETURN THE ORDER TO THE UNDERSIGNED WITHIN THREE BUSINESS DAYS OF RECIEPT OF THE ORDER HEREIN:

/s/ Charles Taylor
ATTORNEY FOR DEFENDANT,
SIBU SAHA, M.D.

Served by mailing a true copy to:

Charles Taylor, Esq.
177 North Limestone
Lexington, Kentucky 40507

John Famularo, Esq.
250 W. Main St.
Suite 2300
Lexington, KY 40507

this 20 day of March, 1998.

/s/ Robert M. True
CLERK, FAYETTE CIRCUIT COURT